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Supreme Court of the United States

October Term, 1964

No. 65

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,

Petitioner,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Statement of the Case	3
The Act	3
The Petitioner	4
The Proceeding	5
Summary of Argument	7
ARGUMENT:	
I. The Board's order was not supported by a preponderance of the evidence either as to substantial control or as to primary purpose	13
A. The Substantial Control Component	15
B. The Primary Purpose Component	18
II. The Board and the court misinterpreted the Act and applied erroneous standards	21
A. The Issues Before the Board and the Standards to be Applied	21
(1) Section 13(f)(1)	22
(2) Section 13(f)(2)	24
(3) Section 13(f)(3)	27
(4) Section 13(f)(4)	33
B. The Board Erroneously Relied on Other Evidence	38
(1) Evidence of activities of members of VALB while acting in other capacities	38

PAGE

(a) Petitioner's Members Promoted Within the Party 39

(b) Party Activities of its Members Attributed to Petitioner 40

(c) Employment of Petitioner's Members as Couriers 42

(2) The Board's Reliance on Hearsay 42

C. Consequences of the Absence of Judicial Review, the Differences Between the Board's and Court's Principles, and the Staleness of the Record 43

III. The provisions of the Act relating to the registration of Communist-front organizations are unconstitutional on their face and as applied .. 45

A. The First Amendment 45

B. The Vagueness of the Statute as Applied by the Court Below 49

C. The Order Below, Predicated Upon Events Antedating the Statute, Denies Due Process and Violates the Ex Post Facto Provision of the Constitution 51

D. The Board's Order Denies Due Process Because it Relied in This Proceeding Upon its Findings in the Communist Party case 53

E. The Act is Invalid as Applied Because it Conflicts With the Privilege Against Self-Incrimination 54

F. The Act is Invalid Because of the Sanctions That it Imposes Upon Petitioner and its Members 54

Conclusion 55

Appendix—Statute Involved 1a

Citations

PAGE

CASES:

American Committee for Protection of Foreign Born v. S. A. C. B., 331 F. 2d 53, *cert. gr.* 377 U. S. 915 30
American Communications Ass'n. v. Douds, 339 U. S. 382 52
Aptheker v. The Secretary of State, 378 U. S. 500 54
Baggett v. Bullitt, 377 U. S. 360 49
Bates v. Little Rock, 361 U. S. 516 46
Burgess v. Salmon, 97 U. S. 381 52
Carlisle v. Rogers, 104 App. D. C. 307, 262 F. 2d 19 44
Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497 ..... 21, 29
Communist Party v. S. A. C. B., 96 App. D. C. 66, 223 F. 2d 531 ..... 24, 30
Communist Party v. S. A. C. B., 367 U. S. 1 ... 1, 4, 12, 18 19, 28, 30, 32, 45, 46, 52, 53, 54, 56
Communist Party v. United States, 331 F. 2d 897, *cert. den. sub nom.*, United States v. Communist Party, 377 U. S. 968 54
Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 ..... 19, 43
Cramp v. Board of Public Instruction, 368 U. S. 278 49
Cummings v. Missouri, 4 Wall. (71 U. S.) 277, 320 52
De Veau v. Braisted, 363 U. S. 144 52
Democrat Printing Co. v. F. C. C., 91 App. D. C. 72, 202 F. 2d 298 44
Dombrowski v. Pfister, *prob. juris.* noted, Oct. Term 1964, No. 54 49
Ex parte Garland, 4 Wall. (71 U. S.) 333 52

PAGE

Cases (Cont'd):

Federal Power Commission v. Idaho Power Co., 344 U. S. 17 43
Federal Trade Commission v. Cement Institute, 333 U. S. 683 28
Flemming v. Nestor, 363 U. S. 603 52

Hansberry v. Lee, 311 U. S. 32 53
Herndon v. Lowry, 301 U. S. 242 49

Kirby v. United States, 174 U. S. 47 53

Lochner v. New York, 198 U. S. 45 48

McNeil v. Kennedy, 111 App. D. C. 409, 298 F. 2d 323 44
Mesarosh v. United States, 352 U. S. 1 21
Mississippi River Fuel Corp. v. Federal Power Commission, 82 App. D. C. 208, 163 F. 2d 433 .. 44

N. A. A. C. P. v. Alabama, 357 U. S. 449 ..... 46, 49
N. A. A. C. P. v. Button, 371 U. S. 415 49
National Council of American-Soviet Friendship v. S. A. C. B., 322 F. 2d 375 (C. A. D. C., 1963) 17
National Labor Relations Board v. Amalgamated Meat Cutters, 202 F. 2d 671 (C. A. 9, 1953) 43
National Labor Relations Board v. Columbian E. & S. Co., 306 U. S. 292 19
National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469 43

Pierce v. Carskadan, 16 Wall. (83 U. S.) 284 52

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 ..... 11, 43, 44
Shelton v. Tucker, 364 U. S. 479 46
Shreveport v. Cole, 129 U. S. 36 52

Talley v. California, 362 U. S. 60 45
Thomas v. Collins, 323 U. S. 516 45

PAGE

Cases (Cont'd):

United States v. Oregon Medical Society, 343 U. S. 326 52
United States v. Watkins, 73 F. Supp. 216 (D. C. S. D. N. Y., 1947) 43
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 28
Wellman v. United States, 253 F. 2d 601 (C. A. 6, 1958) 21
White v. United States, 191 U. S. 545 52
Willapoint Oysters v. Ewing, 174 F. 2d 676 (C. A. 9, 1949) 43
Winters v. New York, 333 U. S. 507 49

United States Constitution:

Article I, Section 9 ..... 2, 12, 21, 52
First Amendment 12, 30, 31, 47, 48, 49, 51
Fifth Amendment 2, 13, 21, 52

Statutes:

Subversive Activities Control Act of 1950, 64 Stat. 987, 68 Stat. 780, 72 Stat. 950, 50 U. S. C. 781 ff. 2, 22
Sec. 2 30
Sec. 3(3) 30
Sec. 3(4) 4, 7, 13
Sec. 3(4)(b) 30, 32
Sec. 7(b) 30
Sec. 13(a) 3
Sec. 13(f) 4, 8, 21, 22
Sec. 13(f)(1) 8, 22
Sec. 13(f)(2) 9, 24, 26
Sec. 13(f)(3) 6, 9, 10, 27, 30, 32
Sec. 13(f)(4) 10, 30, 33
Sec. 13(g)(1) 14
Sec. 14 ..... 11, 14
Sec. 14(a) 2, 4

PAGE

STATUTES (Cont'd):

28 U. S. C. 1254 2
50 U. S. C. 793 2
64 Stat. 1001 2

Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 841, *et seq.* 3

Sec. 13A 3

Internal Security Act, 50 U. S. C. 795 ....2, 28, 33, 38, 47, 49, 50, 51

Smith Act, 18 U. S. C. 2385, 54 Stat. 670, as amended 47, 51

64 Stat. 987 2

Administrative Procedure Act, 5 U. S. C. 1001, *et seq.* 28

CONGRESSIONAL MATERIALS CITED:

94 Cong. Rec.:

6136-7 14

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13725 ..... 22, 31
13764 22
13765 14
14252 22
14530 19
14531 ..... 14, 22, 28
14532 ..... 4, 33, 35
15247 14
15248 22
15669 22
15678 ..... 22, 31
14534 24

108 Cong. Rec.:

7027 51
7031 51

PAGE

HEARINGS:

Hearings before the Committee on the Judiciary, United States Senate, 80th Cong. 2d Sess. on H.R. 5852 22
H. Doc. 708, 81st Cong. 2d Sess. 51
H. Doc. 708, 81st Cong. 2nd Sess. 51
H. Rep. 2980, 81st Cong. 2d Sess. 22, 31
H. Doc. 398, 87th. Cong. 2 Sess. 38

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BRIEF FOR PETITIONER

The Opinion Below

The opinion below (R. 215-232)[1] is reported in 331 F. 2d 64.

Jurisdiction

The judgment below was dated and entered on March 2, 1964 (R. 234). The petition for certiorari was filed on May 5, 1964 and was granted on June 22, 1964 (R. 235). The court has jurisdiction under Section 14(a) of the

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[1] "R." refers to the printed record. "Tr." refers to the original transcript, which has been filed with the court pursuant to Rule 21(3): "P. Ex." refers to an exhibit introduced in the administrative proceeding by the Attorney General, there the petitioner. "R. Ex." refers to an exhibit introduced by the present petitioner, the respondent in the administrative proceeding.

Subversive Activities Control Act of 1950, as amended,[2] 64 Stat. 1001, 68 Stat. 780, 72 Stat. 950, 50 U. S. C. 793, and 28 U. S. C. 1254.

Statute Involved

Pertinent provisions of the Act are set forth in the Appendix to this brief.

Questions Presented

1. Whether an organization satisfies the Act's first requirement that it be controlled by a Communist-action organization where, as the court below found, petitioner's dominant managers were *not* representatives or functionaries of a "Communist-action organization" (*i.e.*, the Communist Party).

2. Whether an organization satisfies the Act's second requirement that it be "primarily operated for the purpose of giving aid and support to a Communist-action organization" where the organization engaged solely in public statements and peaceful activities for innocent objectives.

3. Whether the almost exclusive reliance of the Board and the court below upon the pre-statutory activities of petitioner disregards that court's own strictures, violates the Act, and constitutes an *ex post facto* law and bill of attainder under Article I, Section 9 of the Constitution, and denies due process under the Fifth Amendment thereof.

4. Whether the Board and the court below complied with the statutory mandate to (a) determine "the extent

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[2] The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, 64 Stat. 987, and as amended is hereafter referred to as the Act. The Subversive Activities Control Board, the respondent herein, is hereafter called the Board.

to which" the statutory criteria are established, and (b) make findings upon a "preponderance of the evidence."

5. Whether reversal and remand to the court below or the Board is required where the court below failed to review the Board's standards and findings and adopted substantially different ones.

6. Whether the provisions of the Act relating to the registration of Communist-front organizations are unconstitutional on their face and as applied to petitioner.

7. Whether the reliance by the court below upon a prior determination concerning the Communist Party in a proceeding to which petitioner was not a party is permissible under the Act and Constitution.

Statement of the Case

The decision of the court below (R. 215-232), Chief Judge Bazelon dissenting, affirmed an order of the Board (R. 214) that the petitioner register as a Communist-front organization pursuant to the Act.

The Act

Section 13 of the Act provides for administrative proceedings before the Board, instituted by petitions of the Attorney General, to determine whether accused organizations shall be ordered to register as "Communist-action" or "Communist-front" organizations.[3] On April 20, 1953, the Board ordered the Communist Party of the United States of America to register as a Communist-action organization (R. 201). That order was eventually sus-

[3] The Act also authorizes the Board to declare whether organizations are "Communist-infiltrated" organizations. Such organizations are deprived of the benefits of the National Labor Relations Act, but are not required to register. Sec. 13A, added by Sec. 10 of the Communist Control Act of 1954, 50 U. S. C. 792a.

tained, four Justices dissenting, in *Communist Party* v. *S. A. C. B.*, 367 U. S. 1.

A Communist-front organization is defined by Section 3(4) of the Act as one "which (A) is substantially directed, dominated, or controlled by a Communist-action organization and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title."[4]

Section 13(f) of the Act, as applied to this case, requires that in determining whether any organization meets this definition, the Board shall take into consideration the "extent to which" (1) persons who are active in the "management" of the organization are also "representatives of any Communist-action organization" (*i.e.*, the Communist Party); (2) the organization's support is derived from the Communist Party; (3) the organization's resources are used to promote the objectives of the Communist Party; and (4) the organization's positions do not "deviate from those of" the Communist Party. Board findings must be supported by a preponderance of the evidence (Section 14(a)).

The Petitioner

Petitioner is an unincorporated association consisting of Americans who fought in the Abraham Lincoln Brigade during the Spanish Civil War against Fascism and Franco.[5] Of the approximately 3,000 American youths of diverse

[4] The references in Section 3(4) to a Communist foreign government and the world Communist movement are not applicable here, since the petitioner was found to be controlled by, and primarily operated for the purpose of giving aid to the Communist Party, "a Communist-action organization" (R. 209).

[5] Tr. 481, 493, 582-8, 839, 974, 1048, 1163, 1436-40, 1477, 2149, 2175, 2229, 2430-1, 2585, 3022, 3048, 3203, 3214, 3436, 3511.

political views who fought in support of democracy and the Spanish Republican Government, less than half survived (P. Ex. 50, R. Ex. 44). Petitioner was formed in December of 1939 for the purpose of continuing the friendships formed in Spain and of rehabilitating and resettling the returning veterans. Petitioner gave its members medical care, clothes and some money to tide them over until they could obtain employment. Petitioner assisted veterans in obtaining employment and housing and in the solution of other problems posed by an adjustment to civilian life. Petitioner also engaged in political activity, its main emphasis being in opposition to the Franco regime in Spain (R. 100, 163, 217).

Petitioner's affairs have been run since 1950 almost entirely by Moe Fishman, the Executive Secretary, aided by Milton Wolff, elected National Commander in 1939, who served in a consultative capacity (R. 107). Fishman has also consulted other veterans who were still interested in petitioner's functions and operations (Tr. 3541-2, 4335-8, 4408). Petitioner's national Executive Board has not met or functioned since 1949 (R. 223). Because of its failure to file required reports, petitioner's corporate charter was forfeited in 1952 (P. Ex. No. 260).

Petitioner's activities since 1950 have consisted principally of social affairs, rehabilitation functions noted above, statements in opposition to the Franco regime, support of its members who were indicted under the Smith Act (Tr. 3863-5, 3916-8), and more recently, self-defense in this proceeding (Tr. 3866, 4348, 4383; R. 163).

The Proceeding

On April 22, 1953, the Attorney General petitioned the Board for an order requiring petitioner herein to register as a Communist-front organization under Section 7(b) of the Act. Following an amended petition (R. 2), hear-

ings before the Board commenced on May 3, 1954 and ended on November 16, 1954 (R. 76). On December 21, 1955, 13 months after the close of the record and 19 months after hearings began, the Board issued a registration order against petitioner (R. 214) and a report containing its findings and conclusions (R. 74, 209).

The Board correctly found that Messrs. Wolff and Fishman were petitioner's managers since 1950 (R. 107), and that there was no evidence of their Communist Party membership for at least eight years prior to that date (Tr. 1945, 2002-2006, 2643, 2703, 2753).

The Board's discussion of petitioner's activities was almost exclusively limited to activities antedating passage of the Act by many years. The Board attributed to petitioner the activities of mere members although they were not acting for petitioner (R. 169-170). It did not make the finding required by Section 13(f)(3) as *to the extent* to which petitioner's resources were used to promote Communist objectives. Its conclusion as to petitioner's purpose was therefore based upon a consideration of some of petitioner's pre-statutory objectives and by a total disregard of petitioner's innocuous objectives.

The Board offered no evidence to establish that the Communist Party was a Communist-action organization. The Board held that petitioner was bound in this respect by the Board's determination in the proceeding against the Party, to which petitioner was not a party (R. 197-199).

The court below made no substantial review of the Board's rulings on evidence, its use of criteria in evaluating the evidence, or its conclusions. The court correctly stated that the first half of the statutory definition of a Communist front could only be satisfied by a finding that in 1950 or thereafter the "dominant or key voices in the management of the Brigade" were representatives or functionaries of the Party (R. 222). In disregard of the Board's

indifference to the passage of time, the court below emphasized "the importance of the time element in the statutory terms involved" (R. 219), stating that "this statute is cast in the present tense. It is not designed to produce historical treatises. It is designed to compel the public registration of organizations which, subsequent to the passage of the Act, operate to aid the aims of the Communist movement" (R. 219). It noted as "almost startling" that "so little of the evidence" relates to 1950 or the years thereafter (R. 224). Nevertheless, the court below affirmed the order of the Board per Judges Prettyman and Danaher with Chief Judge Bazelon dissenting (R. 215-232).

Summary of Argument

I.

Section 3(4) of the Act defines a "Communist-front organization" as one which is (a) "substantially * * * controlled by a Communist-action organization" (*i.e.*, the Communist Party) and (b) "is primarily operated for the purpose of giving aid and support" to a Communist-action organization. The Board has the burden of supporting its findings by "the preponderance of the evidence". Its determination must be made as of the time of its report and not with regard to the past.

In the instant case, neither the control nor the objective components were established by a preponderance of the evidence. At least since 1949 petitioner's affairs have been conducted by two principal officers, Messrs. Fishman and Wolff, and there is no evidence connecting either of these two with the Communist Party during this period. The court erred in finding such control in an Executive Committee whose existence was assumed and whose powers were never proven.

The Board treated petitioner's pre-Act activities as the gravamen of the case and disregarded petitioner's post-Act history. The court failed to correct this error. It did agree with petitioner's description of its activities subsequent to the passage of the Act. These activities were shared, as the court found, by non-Communists, were protected by the First Amendment and were not proscribed by the statute. There is no basis, therefore, for the finding that petitioner was primarily operated for the purpose of supporting the Communist movement.

II.

The Board and the court below misinterpreted the Act and applied erroneous standards.

A. Under the Act, the Board was directed to take into consideration each of the four criteria listed in Section 13(f) of the Act, to make a determination as to the present, and to base it upon a preponderance of the evidence. Each of these criteria was misinterpreted and misapplied below.

1. Section 13(f)(1) requires the Board to determine the extent to which persons active in the supervision of petitioner were also active in the management of or as representatives of the Communist Party. Instead, the Board inquired as to whether members of petitioner were also members of the Communist Party. It interchangeably employed the terms "member", "functionary" and "representative", and failed to define them, or to show the evidentiary basis for its categorization of individuals. The court, while disagreeing with the Board, did not require it to reassess the facts.

The Board misapplied the Congressional standard by eliminating the element of time from its consideration. The statute, as the court below held, requires a finding that petitioner's managers were simultaneously Party representatives. The failure to deal with the temporal element

is particularly significant because since 1950 petitioner's affairs have been conducted by two officers, as to whom there is no evidence even of Communist Party *membership* later than 1940 and 1941 (R. 106, 173). The court below made a similar error in relying exclusively upon a single letter, the signatories to which had no post-statutory Communist connections.

2. The Board misconceived the criterion in Section 13(f)(2) which is not whether the Communist Party supported petitioner, but "the extent to which" petitioner's support was derived from the Communist Party. The Board failed to make the comparison between Communist and non-Communist support required by the statute. The Congressional debate shows that the phrase, "extent to which", was expressly adopted by the framers of the legislation to require a determination of relative measure of support. In any event, the findings of post-statutory "support" are limited to three items of publicity in the Communist Party press. This is not what Congress had in mind since Section 13(f)(2) must mean support which is solicited or affirmatively accepted.

3. The Board and the court below made four basic errors in construing the third criterion, Section 13(f)(3) *i.e.*, the extent to which petitioner's resources were used to promote Communist objectives.

(a) They ignored the relativity test, thereby disregarding the principal use of petitioner's resources for the rehabilitation of veterans.

(b) The Board ignored the post-Act events and devoted its report to an elaborate discussion of 1936-1950 as the heart of the case rather than as background. The court, while enunciating the correct principle, did not compel the Board to apply it to this case. The court also accepted without any review the Board's description of background events, including some which are contrary to history.

(c) The Board and court failed to relate the objectives referred to in this criterion to those found by Congress to be the objectives of the world Communist movement, namely, the overthrow of the government by force and violence, if necessary, and the establishment of a totalitarian dictatorship. There is no evidence that any of petitioner's resources were used to promote those objectives and the Board did not find that they were. The Board assumed that any objective, however innocuous, was the Communist objective against which the Act was directed if it happened to be supported by the Communist Party, *i.e.*, it erroneously applied the non-deviation criterion, Section 13(f)(4), to establish the objective criterion of Section 13(f)(3).

The court confused the issue further by stating that innocent activities were an unlawful objective if they resulted from Communist Party control rather than from "independent conviction"; by this test, which was not adopted by the Board, the latter's order must fall because there is nothing in the record to show that petitioner's post-statutory activities were not a matter of independent conviction. Finally, to establish the objective or aid component by proof of the control component would make the former redundant.

4. The Board misconstrued the non-deviation criterion, Section 13(f)(4), in five ways: (a) it again disregarded the time factor; (b) it ignored the fact that petitioner's views were shared by non-Party people; (c) it relied upon non-deviation as to indisputable facts; (d) it disregarded the substantial differences of viewpoint between petitioner and the Communist Party; and (e) it unreasonably found non-deviation in petitioner's positions on such matters as the Internal Security Act, pursuant to which this proceeding was instituted.

B. The Board erroneously relied on evidence which was not connected with petitioner. It attributed to peti-

tioner all of the activities of its members, even though they were not acting on behalf of it. It relied upon promotions inside the Communist Party of some members of petitioner, though the evidence showed no connection with activity in petitioner. The Board charged petitioner with the Communist Party activities of its members, likewise unconnected with petitioner. The Board's report relied on inadmissible evidence, both documentary and testimonial. It advanced the untenable legal theory that the hearsay rule does not apply to Party publications or conversations in Party circles.

C. The Board's order is based upon a misinterpretation of the statutory criteria, a distortion of the record and a reliance on evidence either unconnected with petitioner or inadmissible as hearsay. All of this required a reversal of the Board's order. It was not appropriate for the court to consider whether the evidence would have sustained the Board's order on the basis of appropriate standards and proper evidence. The court below failed even to consider many of the criticisms of the Board noted above. This denial to petitioner of the judicial review to which it was entitled under Section 14 of the statute could be remedied only by remand to the court below.

The court compounded the injury by adopting standards different from those of the Board, some of which were correct and others constituted errors of which the Board had not been guilty. In the light of the disoussion in Point I, the appropriate remedy would seem to be a reversal of the judgment below and a dismissal of the proceeding. At the least, a remand to the Board is required in accordance with the *Chenery* rule. This is particularly appropriate because the record is even staler today, as Judge Bazelon pointed out, than it was nearly a decade ago when the Board made its findings, based upon the events of the 1930s or 1940s.

III.

The provisions of the Act relating to the registration of Communist-front organizations are unconstitutional on their face and as applied.

A. The Act, the Board's order and the court's opinion restrain rights of association, speech, press and petition, all of which are protected by the First Amendment. The considerations of danger to the government, upon which this Court based its decision in the *Communist Party* case, are not present here in an organization whose activities are recognized as innocuous and lawful. The disabilities imposed upon such an organization are so destructive as to discourage not only association with petitioner, but the exercise of other First Amendment rights.

B. The court's decision removes from the statutory definition of a Communist front the only specific reference in the Act, *i.e.*, the objectives of the world Communist movement, that can render it definite and meaningful. Absent such a reference, the statute as applied here creates a vague standard which, particularly in the area of the First Amendment, offends due process.

C. The order below is predicated upon events antedating the statute. It therefore constitutes a retrospective statute which denies due process and which violates the *ex post facto* provision of the Constitution. There is no rational basis in an allegedly regulatory statute for requiring the registration of petitioner upon the basis of pre-statutory events.

D. Petitioner has been held by the court below to be bound by the earlier determination that the Communist Party was a Communist-action organization. This violates the due process principle that one may not be deprived of liberty or property without an opportunity to contest the factual premises upon which the deprivation depends. Peti-

tioner was not a party to the Communist Party proceeding, and the Board did not establish in this case that the Communist Party was a Communist-action organization. Further, the Board made no determination in the instant case that the Communist Party was an action organization at the time of the order against petitioner.

E. The Act is invalid because it conflicts with the constitutional privilege against self-incrimination. In the Communist Party case, a minority of this Court urged that the Communist-action provisions of the Act were invalid because they conflicted with the privilege against self-incrimination of the Communist Party's officers. This view should prevail in the instant case, particularly in view of the failure of the Communist Party to register and the recognized differences in the Act between the Communist Party and Communist-front organizations.

F. The Court should consider the totality of sanctions imposed by the statute upon so-called Communist-front organizations and their members. These very substantial disabilities should not be given effect in the case of organizations to which the sinister objectives of the statute cannot be attributed.

ARGUMENT

1. The Board's order was not supported by a preponderance of the evidence either as to substantial control or as to primary purpose.

Section 3(4) of the Act defines the term "Communist-front organization" as "any organization in the United States * * * which (A) is substantially directed, dominated and controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Com-

munist foreign government, or the world Communist movement."

The Act places a greater burden on the Board than is normally placed upon administrative agencies. It requires that the findings of the Board be supported by "the preponderance of the evidence" (Section 14). The proponents of the Act emphasized that this stricter burden of proof was an important safeguard deliberately inserted to prevent the unfair labelling of an organization. See 94 Cong. Rec. 6136-7, 96 Cong. Rec. 13765,[6] 96 Cong. Rec. 14531,[7] 96 Cong. Rec. 15247:[8] The determination must be made as of the time of the Board's report, December 21, 1955 (R. 74). (See Section 13(g)(1)).

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[6] Rep. Nixon: "* * * in this bill we provide that when an organization which has been found by the Subversive Activities Control Board to be a Communist front or a Communist-action organization makes its appeal to the court, the court on appeal must find that the decision by the Board is sustained by a preponderance of the evidence, a standard which I may say goes much further than any law on the books at the present time governing appeals from administrative bodies.

"I should at this point say that the reason we did this was that we recognized we were dealing here in a field which should be distinguished from legislation affecting property rights, and we felt it was essential to give every possible guaranty to the individuals or organizations involved."

[7] Senator Ferguson: "Not just a scintilla of evidence will suffice, nor will mere substantial evidence support the Board in its findings. It must be the preponderance of evidence, as contained in the full record. [The Board] must weigh all the evidence of record and reach its conclusion on the basis of each evidentiary factor presented in proof or in denial."

[8] Senator Holland: "It is no small thing to charge, it is no easy thing to establish, and it is no small thing to have proven that an organization, as defined in this act, is a Communist-front organization."

In the instant case, there is no evidence whatsoever of post-statutory activities establishing either element of the statute—substantial direction by the Communist Party or the primary purpose of aiding the Party.

A. The Substantial Control Component

The record shows (Tr. 3541-2, 4335-8, 4408-9), the Board found (R. 107, 193) and the court below agreed (R. 224) that since 1950 petitioner has been managed and directed by its two principal officers, Milton Wolff and Moe Fishman. The court below found that there was no evidence to support the Board's finding that either officer was a functionary or representative of the Party.[9] Since as the court below held, the statutory definition of control can be satisfied only by a finding that the "key" managers of the petitioner after 1950 were party representatives (R. 222), there is no evidence, certainly no preponderance of evidence, as to Communist domination in the post-statutory period.

This should have been conclusive; but the court below disregarded its own rule. It deduced Communist domination of petitioner from some signatures appended to a single letter of April 25, 1952 which promoted the sale of an anthology of writings about the Spanish Civil War (R. 223). We discuss this in greater detail than it intrinsically merits

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[9] The court added rather obscurely: "The representative capacity, if any, of these two must be inferred from the fact that they made reports to the Politburo concerning the Brigade" (R. 223). But there is no evidence of any kind and no finding by the Board that Fishman ever reported to the Politburo. The only evidence with regard to Wolff is the testimony of Budenz that Wolff on *one occasion* reported on the VALB to an enlarged National Committee meeting *in 1940* (Tr. 2643). Wolff denied this testimony (Tr. 4223). Indeed, there is no testimony connecting Wolff with the Communist Party even as a member later than 1941 (Tr. 2703, 2753-4), and none with regard to Fishman later than about 1940 (Tr. 1944-5, 2002-7).

because it is the only evidence suggested to refute the undisputed evidence of Wolff-Fishman control.

The letter was signed "Fraternally yours for the National Committee of the Veterans of the Abraham Lincoln Brigade, Milton Wolff, National Commander, Moe Fishman, Executive Secretary" (R. Ex. 44). Following these signatures were the signatures of nine other individuals. The court assumed without further evidence that these nine were members of a National or Executive Committee, that four of them were representatives of the Communist Party at the time of the letter, and that they managed the petitioner (R. 225). The letter should have been disregarded and in any event, under the preponderance of evidence rule, it cannot override the accepted evidence as to the non-Party management of Petitioner by its two officers.

First, it is not at all clear in what capacity the nine individuals had signed the letter. It is more likely, in view of its phraseology, that only Wolff and Fishman signed "for" the National Committee, and that the other nine individually endorsed their request for the sale of the anthology. There is no evidence to explain the letter or to show that the nine were ever elected or appointed to a national committee. The letter, itself, is not a statement of policy or position on behalf of the organization; it is a promotional letter for the sale of a book. It is a very slender reed on which to rest the devastating conclusion of substantial domination by the Communist Party.

Secondly, there is no basis for the assumption that the four (or even the nine) controlled the petitioner. The court inferred control solely from the *imputed* title of the individuals.

> "But the part of these men in the management or control of the Brigade must be inferred from the fact that they were members of the National Committee. The duties of that Committee are not shown by direct evidence. But absent contrary evi-

> dence it is reasonable to assume that a small 'National Committee' had duties relating to management.'" (R. 225-26)

Third, even if we assume, despite the total absence of evidence, that a National Committee had duties relating to management during the 1950-54 period, there is no evidence to show that this factor resulted in control and domination by the Party. Here, the court ignored its own stricture (R. 222) that it is impermissible to infer post-1950 membership or participation in the Communist Party solely from pre-1950 evidence; see also *National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, 322 F. 2d 375, 384. A national board had not met or functioned since 1949 (R. 223; see also Tr. 3341-3343, 4335-4338, 4408). Of the eleven-man National Committee, the court thought that only four could be characterized as representatives of the Party (R. 224-25). Not one is shown to have been a member, much less a representative after 1950. Chief Judge Bazelon thus summarized the evidence:

> "But as to these four of the eleven top officials of the Brigade in 1952, the court ignores the age of the evidence that they were Party functionaries. The most recent evidence on any of the four concerns Weisman, said to be a Party organizer in 1949, and Nelson, on whom the evidence dates from 1946. The finding on Love is based on [fol. 237] testimony given by Horan, who left the Party in 1939, concerning Love's activities in Spain in 1938. The evidence about Harold Smith goes back to 1946, when Earl Browder was expelled from the Party and Smith, his bodyguard, remained loyal to him. Continued loyalty to a man who had been expelled in 1946 does not support an inference that Smith was a Party functionary in 1952." (R. 231-232).

Nothing in the record including the foregoing meets this Court's authoritative definition of subjection to con-

trol: "a disposition unerringly to follow the dictates [of the controller] not by the exercise of independent judgment on the intrinsic appeal that those dictates carry, but for the reason that they emerge from that [controller]". *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 39-40. No instance is cited to show that petitioner received dictates from the Communist Party or adopted policies other than those arising from its own independent judgment. Thus, meaningful evidence of control is lacking.

B. The Primary Purpose Component

The court agreed with petitioner's description of its post-1950 activities.

> "The Brigade says in its brief to us that since the latter date its activities have consisted of social affairs, statements in opposition to the Franco regime, the rehabilitation of Brigade members in need of aid, support of its members indicted under the Smith Act, particularly Nelson and Weissman, and defense of itself in the present proceeding. The report of the Board does not materially contradict this factual position. It finds, and supports with numerous record references, besides a few unimportant incidents, vigorous and vehement opposition to Fascism and particularly to Franco, outspoken opposition to the Internal Security Act and all similar legislation, vigorous support of its indicted members, particularly Nelson, and efforts to defend itself." (R. 226-227)

It agreed "that these positions on these subjects were also held by many people who were not even remotely allied with the Communist Party" (R. 228).

These are certainly not the activities condemned by the statute which describes Communist objectives as:

> "* * * bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorship which will be subservient to the most powerful existing Communist totalitarian dictatorship" (Section 2(b)).

The court, however, disregarded the fact that the activities involved were not those comprehended by the statute, *infra*, p. 1a, and by this Court in upholding the statute, *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1. It held that innocuous objectives were comprehended by the statute, depending upon the motivation of the organization. As the court said:

> "When a person, or an organization, actively presses objectives which are objectives of the Communist Party, does he or it do so as a matter of independent conviction, or does he do so by reason of substantial direction or control by the Communist Party and for the purpose of giving aid and support to the Party? This is a question of fact, the answer to which is to be derived from the record" (R. 228).

We treat of this error of law, as we believe it to be, below, *infra*, pp. 30-32. It is sufficient here to note, first, that the Board never posed the question in this way, and second, that nothing in the post-1950 life of the petitioner is cited to show, in compliance with the preponderance of evidence rule,[10] that the activities were undertaken primarily[11] "for the purpose of giving aid and support to the Party".[12]

Our view is supported by a closer examination of the admitted post-Act activities:

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[10] See the discussion *supra*, p. 14, to the effect that the Board has a greater burden of proof than that normally imposed on administrative agencies. As to the requirements of this latter burden, see *Consolidated Edison Co.* v. *National L. R. Bd.*, 305 U. S. 197; *National Labor Rel. Bd.* v. *Columbian E. & S. Co.*, 306 U. S. 292.

[11] See Senator Ferguson's emphasis on the significance of the word "primarily". 96 Cong. Rec. 14530.

[12] In recapitulating petitioner's post-Act activities, the court referred (R. 227) to, among other things, statements on the Korean War and attacks on the Un-American Activities Committee. But the Board's findings on these matters pre-date the Act (R. 170-173).

(a) *Opposition to fascism and Franco.*[13] Despite the contrary opinion of the Court (R. 227-228), opposition to Fascism and Franco is not a peculiarly Communist point of view. On the contrary it has been, at least until quite recently, the consistent position of the majority of the American people (R. Ex. 15).[14] It is the position which one would expect of those who made such sacrifices in the Spanish Civil War.

(b) *Self-defense.* The presumption that an organization would defend itself "as a matter of independent conviction" is so great that in the absence of some contrary tangible evidence it is only fair to assume that this was the organization's reason for action in this area. There is no contrary evidence in the record.

(c) *Opposition to the Internal Security Act.* This activity was intricately tied in with the organization's self-defense campaign. Indeed, of the four post-Act exhibits relied upon by the Board for its findings in this area (R. 173-178), three (P. Exs. 116, 227 and 225) dealt with the organization's defense against the proceedings in this case.

(d) *Defense of its members prosecuted under the Smith Act and state sedition acts.* Here, too, it was quite natural for the organization to come to the defense of its own members, and in the absence of some concrete evidence, which is lacking here, there is no basis for assuming that

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[13] The Board was disturbed by petitioner's publication of an anthology of writings about the Spanish Civil War whose contributions included Heywood Broun and Herbert L. Matthews, *supra*, p. 15, R. 129; and by petitioner's protests against the appearances of a Falangist Dance Group from Spain (R. 129) and the visit of the Mayor of Madrid (R. 162).

[14] See, *e.g.*, Payne, *The Civil War in Spain* (G. B. Putnam Sons, New York, 1962); United Nations Security Council, Report of the Subcommittee on the Spanish Questions (R. Ex. 34), pp. 38-39, 59-75. Indeed, even the Board recognized that anti-Fascism is the general attitude in this country (R. 208).

it did what it did because of outside direction. Moreover, the court ignores the significant fact that the petitioner's defense of these individuals was successful and that the convictions were set aside. *Commonwealth of Pa.* v. *Nelson*, 350 U. S. 497; *Mesarosh* v. *United States*, 352 U. S. 1; *Wellman* v. *United States*, 253 F. 2d 601.

The court's recognition that these post-Act activities are not proscribed by the Act is shown by its suggestion that "the Board was entitled to view these events in the context of, or through the coloration of, the past" (R. 228). This, as we show below, would make a mockery of the time factor emphasized by the court, would change the statute from a regulatory to a punitive one, and would create substantial problems under the due process and *ex post facto* clauses of the Constitution. In any event, the preponderance of evidence rule is not met by a total reliance, as here, upon the past.

II. The Board and the court misinterpreted the Act and applied erroneous standards.

A. The Issues Before the Board and the Standards to be Applied

In determining whether an organization meets the definition of a Communist-front organization, the Board was required to take into consideration the four criteria set forth in Section 13(f) of the Act:

> "(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and,
>
> "(2) the extent to which its support, financial or otherwise, is derived, from any Communist-action organization, Communist foreign government, or the

world Communist movement referred to in section 781 of this title; and,

"(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title; and,

"(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 781 of this title." (§ 13(f))

Under the Act, the Board is required to take into consideration each of these four criteria, H. Rep. 2980, 81st Cong. 2d Sess., p. 12, 96 Cong. Rec. 15248, and no one criterion can be dispositive of the ultimate issue, 96 Cong. Rec. 13725, 13764, 14531, 15669, 15678. And as we have noted, *supra*, p. 14, the Board's findings must be supported by "the preponderance of the evidence."

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(1) Under § 13(f)(1), the Board was required to determine the extent to which persons active in the supervision of petitioner were also active in management of or as representatives of the Communist Party. Congress did not consider it relevant here that persons active in the management of one organization were mere members of the other. Since the court below has indicated its reasons for agreement with this view (R. 220-222) we need not repeat the statutory analysis made below.[15] But the Board totally failed to meet this requirement. It made much use of the terms "functionaries" and "representatives" but it never defined them or stated the evidentiary basis on which it

[15] See also 96 Cong. Rec. 14252; testimony of Donald Richberg in Hearings before the Committee on the Judiciary, of the United States Senate, 80th Cong., 2d Sess. on H. R. 5852, p. 14.

reached its conclusion that individuals should be thus characterized. Instead the Report merely uses the formulae that named individuals "are established to have been C. P. U. S. A. functionaries" (R. 99), or has been "established as a Party functionary" (R. 101), or are "identified herein as Party members or functionaries" (R. 101), or "the following Party representatives" (R. 107). The Report contains no transcript references for any of these findings. Plainly the Board sees no distinction between members, functionaries, or representatives of the Party;[16] hence it ignored entirely the criterion established by Congress and substituted its own less restrictive and amorphous standard. Since the Court disapproved this assimilation of mere membership to official leadership (R. 220, 222), it should have dismissed the proceeding or remanded the matter to the Board to comply with the statutory standard.

The Board's second error was to eliminate the element of time from its consideration. The events it describes cover a span of eighteen years from 1936, the beginning of the Spanish Civil War, to 1954. It never found that a particular individual was simultaneously a representative of both the Party and the petitioner. (See, *e.g.*, Tr. 1158-9; Tr. 1284, 1291-3, 1305-6, 1329, 1335-7). The court again disapproved in principle with this approach of the Board

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[16] *E.g.* after listing the names of individuals whom the Report elsewhere describes as "established functionaries" or "representatives", the Board recites that the government's "evidence establishing that the officers and members of the respondent above so found are Party *members* is left uncontradicted" (emphasis supplied) (R. 108-109). And in a footnote, the Board states that it is overruling petitioner's exceptions to the findings in the Recommended Decision that "some twenty-odd of its named officers are shown to be *Party members or functionaries*" (emphasis supplied) (*ibid.*). On the basis of such findings the Board concludes that petitioner's "principal active officers, since its inception, have also been *functionaries and representatives of the Party*" (emphasis supplied) (R. 109).

(R. 224). But it made a similar error, decisive to its conclusion, in relying upon the signatories to the letter dated April 25, 1952 when the evidence as to their Communist Party connections was entirely pre-statutory (*supra*, p. 17).

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(2) The Board misconceived the significance of the criterion in § 13(f)(2), which is not whether or not the Party supported the petitioner, but rather "the extent to which" petitioner's support was derived from the Party. See *Communist Party of U. S. v. Subversive Activities Control Board*, 96 App. D. C. 66, 96, 223 F. 2d 531, 561.

Thus it ignored the question of the measure of Communist Party support *in relation* to the total support received by petitioner. It found (R. 131) that the Party supported petitioner, but held that support to the petitioner by non-Communist sources was irrelevant (R. 131-132). It ignored the considerable evidence of support from non-party sources, *e.g.*, letters or telegrams, endorsing and praising petitioner from Marine General Carlson (R. Exs. 21, 22); from Harold L. Ickes (R. Ex. 35); from Herbert Matthews (R. Ex. 37); from Louis Bromfield (R. Ex. 38); from Jo Davidson (R. Ex. 39); from Vincent Sheean appealing for funds to be sent to petitioner (R. Ex. 36; Tr. 3790); endorsement by Ernest Hemingway (Tr. 3831).

Congress deliberately adopted the phrasing "extent to which" in order to prevent a reliance by the Board on the existence of support without regard to its relative extent. Thus, in the Senate debate, Senator Ferguson, co-author of the Senate bill and a member of the Judiciary Committee which drafted the final version of the legislation, stated (96 Cong. Rec. 14534, emphasis supplied):

> "It need only be repeated from the discussion of the criteria themselves that the Board must weigh each element of the evidence in reaching its decisions. The phrase 'the extent to which' is a guide in that direction.

> "I am very familiar with the suggestion of Mr. John W. Davis * * * [of] a preferable alternative. The alternative was to substitute the words 'whether or not.'
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> "That suggestion was made by Mr. Davis to the Judiciary Committee as a possible contribution to 'draftsmanship,' in his words. Like each of Mr. Davis' suggestions, for we draw heavily upon his knowledge of the law and opinion, this particular suggestion was weighed carefully by the committee.
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> "*It was our considered opinion in conclusion that the words 'whether or not' were an absolute, and took no recognition of degree* * * * Because it was our earnest desire, as I have sought to emphasize in my earlier remarks, to have ultimate decisions reached in the full spirit of the judicial process, upon the sum and not a part of the record, we advisedly adopted the phrase 'the extent to which'."

The Board's failure to follow this guide imposed by Congress explains the insubstantial nature of its findings. For example, the Board finds that the Party urged its members to support a rally of the petitioner which was attended by approximately 5,000 persons (R. 126). The Report, however, does not consider whether Party support accounted for half of the support or only 1%, how many other rallies were held, and to what extent they had Party support.

In only one instance in the Report are we given data by which to measure the extent of the support received by the petitioner from the Communist Party. According to the Report (R. 123-124), the petitioner, in 1945, raised nine to ten thousand dollars at a dinner. Of this sum, $500 came from Communist Party sources.[17] Thus, on the basis

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[17] Even of this sum, only $300 came unequivocally from the Communist Party, the remaining $200 being contributed by Communist Party officials, and the record does not show, nor does the Board find, that these contributions were made by them in their official capacity rather than as individuals. The Act speaks of support from a Communist-action organization, not from individuals who also hap-

of this incident, which is the only one showing a relationship between Communist Party contributions and total contributions from other sources, the Board should have found that the extent to which petitioner derives support from the Communist Party was 5%. Such a finding, we submit, could not support the conclusion that the petitioner is controlled by the Party and operates primarily in its interest.

Moreover, the findings of Party "support" *after* the passage of the Act are limited to three items of *publicity* in the Communist Party press as to activities of the petitioner (R. 128-129).[18] We do not agree with the conception that newspaper publicity can constitute support under the statutory criterion. Section 13(f)(2) necessarily refers to support which is solicited or affirmatively accepted; otherwise an organization would be condemned by the conduct of others over which it has no control. In any event, three

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pen to be Communists. The same paragraph of the Board's report (R. 123-124), also lists a contribution of $1,200 from one Charlotte Honig, who was identified as a Communist Party member (R. 123). But there is no evidence that this was a Communist Party contribution and the Board does not so find. The government's evidence shows that Mrs. Honig's support of the petitioner stemmed from the fact that her son had died in Spain while fighting for the Republican government (Tr. 1940-1).

[18] We do not include here as evidence of support P. Ex. 172, which, according to the Board, "publicizes [petitioner's] tribute to Stalin," in 1953 at the time of his death. The Board's argument (R. 130-131) that articles in the Daily Worker, unlike those from the New York Times or the Herald Tribune, are admissible in evidence to prove the truth of their statements can only be described as bizarre. See, *infra*, pp. 42-43.

We also do not consider as evidence of Party support, the fact that *The Heart of Spain* (R. Ex. 44), was printed by the same company that printed Party publications (R. 129). The mere fact of printing is no indicia of support in the absence of evidence that this printing was done on other than a purely commercial basis, and there is no such evidence.

items of publicity are neither substantial evidence of Party support nor an index of the extent of such support from Party as contrasted with non-Party sources.

The court's opinion likewise fails to evaluate "the extent to which" petitioner's support was derived from the Party. All that appears in the opinion of the court is a generalization: "in the light of all that had gone before, considering the extent to which * * * the Party supported it" (R. 228-229). It is not clear whether the court was referring to as pre-statutory or post-statutory support and its "discussion of the evidence" does not "demonstrate the point." (R. 229).

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(3). The Board and court made four basic errors in construing the third criterion, "the extent to which" petitioner's resources are used to promote "the objectives" of the Communist Party [Section 13(f)(3)]. They ignored (a) the "extent to which" test, (b) the distinction between pre-statutory and post-statutory activities, (c) the statutory definition of Communist objectives, and (d) the requirement that both the control and objective components of a Communist-front organization be established. We treat these errors seriatim:

(a) The Board made no effort to contrast the use of petitioner's resources for Communist and non-Communist objectives. Consequently, it ignored the undisputed evidence that one of petitioner's principal functions, if not the principal one, was the rehabilitation of veterans. (R. 94-95; Tr. 3529-30, 3554, 3863-69; P. Ex. No. 651 (Certificate of Incorporation of Petitioner); P. Ex. 59[19], 68, 71, 72, 73).

The Board's Report does not indicate that it considered this rehabilitation program in the total program of the petitioner, presumably because it did not consider that this

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[19] The next to last page of this Exhibit is the petitioner's estimated budget for 1940. Of a total budget of $13,527.00, $11,500 is allocated for rehabilitation.

program constituted evidence of Communist Party control or direction, or of operation of the petitioner for Communist Party purposes. But it was the Congressional intention that the Board make its findings on all evidence in the record and not on just some evidence; this was the purpose of including the phrase "the extent to which."[20]

(b) The Board ignored the events of the current period and devoted its Report to an elaborate discussion of the events of 1936 to 1950 as the heart of the case, rather than background to illuminate the present. See *Communist Party* v. *S.A.C.B.*, 367 U. S. 1. 69; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 704. This is most graphically revealed by its summary of the evidence (R. 203-208) in which it not only failed to show any appreciation that consideration of the 1950-54 events was crucial to its determination, but *failed to discuss these post-statutory events at all.*

The Board's Summary contains a recitation of "[t]he facts established by a preponderance of the evidence" beginning in 1936 and ending with the Hitler-Stalin pact in 1941[21] (R. 203, 207-208). It would appear from the Summary that the crux of the Board's case was its finding as to petitioner's position on the Hitler-Stalin Pact (R. 207-208).

The court below correctly stated that the Board was entitled to view present events "in the context or through

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[20] See the quotation from Senator Ferguson, *supra*, pp. 24-25. See also 96 Cong. Rec. 14531 where Senator Ferguson stated that the Board "must weigh all the evidence of record and reach its conclusion on the basis of each evidentiary factor presented in proof or in denial." This same requirement is imposed upon the Board by the Administrative Procedure Act as well, *Universal Camera Corp.* v. *National L. R. Bd.*, 340 U. S. 474. The later Act is expressly made applicable to proceedings of the Board, by § 16 of the Internal Security Act, 50 U. S. C. § 795.

[21] See *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 67, holding that it was fair to assume that the Board relied for its conclusion only on those matters set out in its Summary.

the coloring of the past" (R. 228). But as we have seen, the Board never exercised this right; it totally ignored current events, and treated the past as the core of the case.

The court's opinion shows the inadequacy of the 1950-54 events as a basis for the finding against petitioner. And if "background" events are essential to the Board's order, then petitioner was entitled to a full court review of those events. The court merely took the Board's statement of the background evidence without examination or review, although petitioner challenged the accuracy of the Board's findings throughout.[22] Apparently crucial to the court's decision is its view that the Spanish Civil War was "basically" a struggle between Communism and Fascism (R. 228). This finding is not supported either by the record[23] or by history.[24]

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[22] Although unimportant in itself, illustrative of the Court's approach is its recital (R. 223) that there was a dispute between the Board and the petitioner as to how many of the American volunteers returned from Spain. But the dispute was not solely between the Board and petitioner, but between the Board and the record (see P. Ex. 50, R. Ex. 44).

[23] The only competent evidence in the record on this issue, that of General Jose Asensio (Tr. 2971-3004, 3076-3129), showed that the Republican forces in Spain consisted of a coalition of a number of political parties representing the overwhelming majority of the Spanish people. Similarly the Republican cause was supported by 75% of the American people (Resp. Exh. 15).

[24] See, *e.g.*, Benns, *Europe Since 1941 In Its World Setting* (Appleton-Century Crofts, Inc., 1954), pp. 328-9; Palmer, *A History of the Modern World* (Alfred A. Knopf, 1956), pp. 821-2; Zebel, *A History of Europe Since 1870* (J. B. Lippincott Co., 1948), p. 643; Hall, *Europe in the Twentieth Century* (Appleton-Century Crofts, Inc., 1957), p. 242; Thompson, *Europe Since Napoleon* (Alfred A. Knopf, 1952), pp. 675-6; Ergang, *Europe in our Time, 1914 to the Present* (D. C. Heath & Co., 1958), p. 389.

Even if it be conceded that historians differ as to the nature of the Spanish Civil War, it is not appropriate for either the Board or the Court to formulate a legal conclusion which is to any degree based upon an unsubstantiated or disputed historical premise. This is especially true under circumstances where neither the Board nor

(c) The fundamental error below was to disregard what Congress meant by Communist "objectives," as used in Section 13(f)(3) as a basis for determining the aid or objective component in Section 3(4)(B). The answer is found in Section 2 of the Act which sets forth the objectives of the Communist movement, *viz.*, the overthrow of the government by force, if necessary, and the establishment by terroristic means of a totalitarian dictatorship. As Judge Bazelon, dissenting in the companion case, said:

> "I think the word 'purpose' in § 3(4) should be read in connection with the word 'objectives' in § 3(3). This context indicates that 'purpose' is intended and should be understood to be limited to the purpose of aiding a Communist-action organization to advance the objectives of the world Communist movement." *American Committee for Protection of Foreign Born* v. *S. A. C. B.*, 331 F. 2d 53, 61-62, *cert. gr.*, 377 U. S. 915.

The Board assumed that any innocuous objective was the Communist objective against which the Act was directed if it happened also to be supported by the Communist Party. In short, it regarded evidence of mere non-deviation under the fourth criterion, Section 13(f)(4), as proof of Communist "objectives" under the third criterion, Section 13(f)(3).

This was error because as stated by this Court in *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 59, 61 and by the court below in *Communist Party* v. *S. A. C. B.*, 99 App. D. C. 66, 95196; 223 F. 2d 531, 561, the non-deviation standard is relevant only to the control component and not to the objective component. This is true because all of the evidence considered under the non-deviation standard are expressions protected by the First Amendment (R. 131-178). Since these views are not inherently invidious

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the Court has undertaken the necessary historical research as a basis for coming to its own judgment on the subject. Moreover, historical controversies have not traditionally lent themselves to judicial resolution.

they may be considered only insofar as the non-deviation proves outside domination. And because these views are protected by the First Amendment, a registration order based solely upon the finding of non-deviation as described in criterion 4 cannot stand. Hence, Senator McCarran, Chairman of the Senate Judiciary Committee which considered the legislation, in replying to the veto message of President Truman and in urging the Senate to override the veto, stated, 96 Cong. Rec. 15678:

> "On page 9 of the mimeographed copy, the veto message states that the bill would permit a determination that an organization was a Communist-front organization to be based solely upon the 'extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those' of a Communist movement. Mr. President, that statement simply is not so. The able Senator from Florida, Mr. Holland, on the floor of the Senate on Wednesday most ably demonstrated that it was not so." [25]

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[25] See also the similar remarks on the floor of the House made by Congressman Walter speaking for the House Committee on Un-American Activities which reported the bill in the House, 96 Cong. Rec. 13725. Cf. H. Rept. No. 2980, 81st Cong., 2d Sess., the report of the House Committee on Un-American Activities on the bill at p. 3 (emphasis supplied):

> "In considering the problem, the committee found it necessary at the outset to distinguish those features of Communist activity against which legislation cannot and should not be directed from those in the case of which legislative restraints are clearly practicable and necessary. Communism as an economic, social, and political theory is one thing. *Communism as a secret conspiracy, dedicated to subverting the interests of the United States to that of a foreign dictatorship, is another.*
>
> "The committee holds no brief for the economic, social and political theories which the Communists advocate, but we contend that, under our constitutional system, ideas must be combated with ideas and not with legislation. If communism in the United States operated in the open, without foreign direction, *and without attempting to set up a dictatorship subservient to a foreign power, legislation directed against it would neither be justified nor necessary.*

The Board made a different kind of error in finding that the petitioner's payment of salaries and expenses to its own officers and employees constituted support of the Party and the world Communist movement (R. 186-187). Without evidence as to the nature of the work of these officials and employees, it is improper to find that these internal operating expenses support Communist objectives.[26]

The court, without discussion, rejected petitioner's claim that the Communist "objectives" of 13(f)(3) (and the aid or objective component of Section 3(4)(b)) cannot be met by evidence of innocuous activities. But it added a new condition to the Board's reliance upon non-deviation—proof that the innocent policies resulted from Communist Party control, rather than as "a matter of independent conviction" (R. 228).

This new test was not adopted by the Board and there is nothing in the record or in the court's opinion to show that these post-statutory activities were for the attributed purpose rather than as a matter of independent conviction. Finally, to establish the aid component by evidence of domination makes the second half of the definition redundant. Congress could have but did not define a Communist front as one substantially dominated by a Communist-action organization, without more. The court below was confused by this Court's reference to "independent judgment" in its discussion of the *control* component, *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 39-40. But this Court never suggested that it could transform an innocent into a sinister objective.

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[26] For example, Wolff who was not in recent years on petitioner's payroll was placed on petitioner's payroll during the course of the hearings in these proceedings for the purpose of aiding in petitioner's defense (Tr. 4077-8). Indeed, in recent years, the major activity and expenditures of the petitioner have been in connection with defending itself in the proceeding before the Board (Tr. 3866).

(4) The next criterion, that of non-deviation of positions, (§ 13(f)(4)), is relevant only to the control component, *supra,* page 13. It too was treated below without regard to the factor of time. The Board also ignored the fact that in many instances in which it relied upon the similarity of views between the petitioner and the Party, those views were also shared by many groups and individuals who were indisputably not Communist. Thus the common policy of both the petitioner and the Party for breaking relations with Franco (R. 153-155) was shared among others by foreign Minister Bidault of the French Government, Phillip Murray, President of the Congress of Industrial Organizations, Frank Graham,[27] William Shirer and Raymond Swing (P. Ex. 18).

The common policy of both petitioner and the Party against the impending execution of anti-Franco leaders, Alvarez and Zapirin (R. 159) was also shared by the French government, 94 members of the British House of Commons, nine from the House of Lords and 3 bishops (P. Ex. 187). Similarly the National Front movement in Spain which, according to the Board, was supported by both the Party and the petitioner in 1944 consisted of representatives from both the Left and Right Republican Parties, the Catalonian Party, the Socialist Party, the Communist Party, the Anarchist, Socialist and Communist-led trade unions, and the Catholic Party (P. Ex. 140).[28]

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[27] Graham was subsequently United States Senator from North Carolina. Significantly, he also shared with both the Party and petitioner, opposition to the Internal Security Act, see *infra,* p. 35, and indeed was probably the most outspoken opponent of this legislation on the floor of the Senate. See 96 Cong. Rec. 14532-4.

[28] Similarly during the period when both petitioner and the Party were urging that America stay out of World War II, according to the Daily Worker, this view was shared by 85% of the American people (P. Ex. 37). Although we would not ordinarily consider such evidence as admissible, under the Board's view of the infallibility of the Daily Worker, see *infra,* pp. 42-43, the statement must be accepted as true.

The Board gave great weight to the fact that both the petitioner and the Party agreed that because Spain was the mother country of Latin America, events in Spain would have considerable influence on events in Latin America (R. 151-161). But the Board may consider only those views and policies on which it is at least possible to have a difference of opinion. No individual, regardless of how anti-communist he may be, would take issue with that view just expressed.[29]

Finally, the Board failed to take note and consider evidence of substantial differences of viewpoint between the petitioner and the Party. Thus, in its discussion of Greece, the Truman Doctrine and the Marshall Plan, the Board recites the position taken by the Party as follows (R. 169-170):

> "[The Party hailed] Lenin's correctness regarding imperialism as the era of dying capitalism and the age of the proletarian revolution. Gates took the position that the United States, being the leading imperialist power, was in the throes of dying capitalism. He criticized the Truman Doctrine, the Marshall Plan, and the North Atlantic Pact as imperialistic and capitalistic, designed to gain control of the nations of Europe in order to prevent them from coming to an agreement with the Soviet Union and other European Communist nations. He further stated that the working class, under the guidance of Marxism-Leninism, could lay the groundwork for socialism in the United States and the overthrow of capitalism."

But the excerpt from petitioner's publication, quoted immediately prior to the above as an example of similarity

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[29] The Board's reliance on the statement that fleeing Nazis escaped to Argentina through Spain is erroneous for the same reason. This is not a policy or a view, it is a plain statement of fact. See *e.g.*, the *Eichman* case. And the Court may take judicial notice that Argentina dictator Peron has taken refuge in Spain.

of views says nothing about imperialism, or dying capitalism, or proletarian revolution or Marxism-Leninism or the overthrow of capitalism in the United States and the establishment by the working class of the groundwork for socialism. It speaks instead of the aspirations of the people particularly in colonial countries for "democracy • • • security, for decency, for peace." These two statements of views are obviously widely apart in attitude, basic approach, and fundamental significance.[30]

Another important instance occurred in connection with the Board's discussion of petitioner's position on the Nazi-Soviet Pact and World War II (R. 131-140). The Board's finding that petitioner "reversed its anti-fascist policies" because of the Nazi-Soviet Pact (R. 136) is a distortion of the record. Wolff testified that the petitioner consistently opposed the Fascist governments of Germany, Italy and Spain and that this opposition continued after the Nazi-Soviet Pact (Tr. 3607-8, 4159). Petitioner also opposed the English and French governments headed by Chamberlain and Daladier respectively because it considered them equally responsible for the destruction of the Spanish Republican government (Tr. 4159). It was for this reason that petitioner opposed our government taking sides in the conflict. The character of the war began to change for petitioner when Churchill came to power in England during the Nazi campaign in Yugoslavia and during the fall of France. The most dramatic demonstration of

[30] It is not necessary for a finding of deviation that there be a direct conflict in views. Criterion 4 speaks of the extent to which the views of the alleged Communist-front do not "deviate." It does not pose as the test the extent to which the views do not conflict. In the course of the Senate debate, Senator Graham attacked the non-deviation standard as a criterion for a finding that an organization was a Communist-front. In reply, Senator Mundt, one of the authors of the bill, said that the failure to take a position similar to that of the Communist Party would be considered by the Board to be evidence of deviation. 96 Cong. Rec. 14532.

the change was Hitler's attack upon Russia (Tr. 4161). But petitioner's opposition to Franco, Mussolini and Hitler was never altered. The Board's failure to make findings on the basis of Wolff's uncontradicted testimony as set out above cannot be attributed to its refusal to credit that testimony. The Board recites its own version of Wolff's testimony on this subject (R. 146-147).[31]

The Board made no finding that Wolff's testimony was unworthy of belief and hence should not be credited; rather, it appears to have completely misunderstood its significance. For it found that Wolff's testimony that petitioner never altered its anti-fascist policy "neither substantially contradicts nor refutes" the Board's finding that petitioner did reverse its anti-fascist policy at the time of the Nazi-Soviet Pact[32] (R. 146). Nor is it necessary to rely solely

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[31] Characteristically, the Board relies upon Wolff's testimony that the character of the war was changed by Hitler's attack on Russia (146), but ignores his testimony on the same page of the transcript (Tr. 4161) that the character of the war had begun to change as the result of Churchill's coming to power in England, the invasion of Yugoslavia and the fall of France.

[32] The irrational nature of the Board's conclusion is highlighted by its finding that, according to petitioner, after the Nazi-Soviet Pact "the war had suddenly become * * * an imperialist war between imperialist powers" (R. 136). The Board's underlying assumption is that there had been a state of war between Germany on one side and France and England on the other; that petitioner had supported the side of France and England but "suddenly" changed its view as to the character of the war because of the Nazi-Soviet Pact. The assumption, however, cannot be squared with history. The Court can take judicial notice that World War II did not break out until *after* the Nazi-Soviet Pact. And petitioner's opposition to the Chamberlain and Daladier governments because of their role in Spain predated both the Nazi-Soviet Pact and World War II. This gaucherie of the Board is but one example of the pitfalls presented by the effort to fit historical events into a preconceived framework that will demonstrate the working of a world-wide Communist conspiracy. Despite the earnest efforts of the Board, historical events simply do not fit into this framework.

on Wolff's testimony for the proposition that petitioner, contrary to the finding of the Board, never altered its anti-fascist policy. There is also contemporaneous documentary evidence which was ignored by the Board entirely. Thus an editorial in the Herald Tribune of December 26, 1939 commented that petitioner did not follow the "Party line" because it continued to denounce Hitler despite the Nazi-Soviet Pact (R. Ex. 46). For the petitioner, Wolff replied reaffirming petitioner's firm opposition to Franco, Mussolini and Hitler (R. Ex. 47).

The significance of this error of the Board can only be appreciated in the light of the Board's conclusory findings. For, in summing up the basis for its conclusion that petitioner "functions primarily to give aid and support to the Party and the world Communist movement," the Board recited as follows (R. 207):

> "[Petitioner's] complete reversal of its 'anti-fascist' line following the signing of the Hitler-Stalin Pact, and its adoption, promulgation, and active implementation of a contrary policy and program is a most graphic illustration of this function. This abdication of its *raison d'etre* exposed 'anti-fascism' as a cloak which enshrouds its function as an instrument of the Communist united front Technique, subservient to the Party and the world Communist movement."

This argumentation furnishes the main prop for its order of registration,[33] and it is fair to say that the order could not stand in its absence. Yet, as we have shown, it is based on a faulty factual premise. Moreover, the conclusion is belied by other evidence as well. As acknowledged by the Board, the "policies of the VALB concerning Spain are its main emphasis" (R. 152). The petitioner is the only organization in the United States whose primary

[33] We discuss elsewhere our contention that in any event the registration order to be valid must be based on post-Act activities and not on occurrences in 1939, *supra*, pp. 14, 17, 23-24.

purpose is to be anti-Franco (Tr. 3872-3), and it has never altered its position of opposition to Franco (Tr. 3914, 3607-8).[34] Since petitioner has been consistently and unremittingly anti-fascist in what is concededly its major area of emphasis, there is nothing to support the Board's charge that petitioner was guilty of "abdication of its *raison d'etre.*" Despite its colorful and sweeping language, the Board does not cite a single instance to show that petitioner's unremitting hostility to Franco ever abated even to the slightest degree.

Finally, the Board's reliance on petitioner's opposition to the Internal Security Act (R. 172-174) does not establish non-deviation under the statutory criterion. This Act was openly directed against the Communist Party and alleged Communist fronts. Petitioner had already been officially "designated as a Communist front by the House Committee on Un-American Activities in 1946, and by the Attorney General in 1947 and 1948." (See *Guide to Subversive Organizations and Publications,* H. Doc. No. 398, 87th Cong. 2d Sess. pp. 166, 167.) Since the legislation was directed against petitioner, it had no choice except to oppose it.

B. The Board Erroneously Relied on Other Evidence

In addition to its consideration of the evidence encompassed within the four criteria discussed above, the Board improperly relied on other evidence as well, and the Court failed to make any comment, although the matter was fully briefed. We set it forth here in abbrieviated form.

(1) *Evidence of activities of members of VALB while acting in other capacities.*

The Board's most common error was its consideration of the activities of all members of the petitioner, as binding

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[34] The U. S. State Department has not shown the same consistency. Although at one time anti-Franco, it shifted to a pro-Franco policy, although there were no changes in the character of the Franco regime to justify such a shift (Tr. 3905-15).

on petitioner, without regard to whether or not their activities were in any way connected with the petitioner. Reliance on evidence of this nature is clearly ground for reversal since the Board itself recognized, at least in principle, that it was erroneous to do so. The Board stated:

> "It should be noted, however, that the Party activities of [petitioner's] members were not utilized as a basis for finding that [petitioner] aids the Party, except in those instances, where additional evidentiary circumstances so warranted." (R. 198-199)

Despite this disclaimer, a very considerable portion of the findings of the Board consists of evidence of this character.

(a) Petitioner's Members Promoted Within the Party.

Under this heading, the report discusses the Party positions held by members of the petitioner, or the jobs which they received with Party aid (R. 113-117), although none of this was attributable to their membership in petitioner. Most, if not all, of the individuals mentioned in this section were members of the Party before they went to Spain (Tr. 148, 370-1), and whatever recognition they got from the Party was because of their record in Spain and not because of their membership in petitioner (Tr. 144).[35] Indeed, the government's witness, Lautner, whose testimony is the chief source for this section of the Report, had no knowledge that the individuals named were members of the petitioner. He merely took it for granted that since they were veterans of the Abraham Lincoln Brigade they were also members of the Veterans of the Abraham Lincoln Brigade (Tr. 370-1). This may have been a rational and correct assumption, but the need for Lautner to make the assumption indicates that membership or activity in the petitioner had no bearing on promotion with the Party.

[35] The Board Report recognizes this at least in part. Thus a footnote recites that Steve Nelson was drafted to the Party's National Committee "because of his outstanding work in Spain" (R. 114).

Indeed, many of the individuals listed in this section as receiving Party preference and favor were not shown to have had any activity in petitioner.[36]

(b) Party Activities of its Members Attributed to Petitioner.

Despite its disclaimer, the Board persistently attributed to petitioner the Party activities of its members despite the absence of any showing of petitioner's authorization or responsibility for their activities. Thus the Board states:

> "VALB members are shown to have: taught Marxism-Leninism within the Party; recruited for the Party; brought charges resulting in enforcement of Party discipline including expulsion from the Party; been featured speakers at Party meetings and rallies; and to have actively filled a number of official Party positions ranging from Branch Organizers to National Committee members. Their Party activities have spanned [petitioner's] entire existence into the present." (R. 109-110)

Since these generalities are not otherwise specified or annotated, there is no way of determining what specific incidents in the record are covered by these findings. In any event, the Board does not find that this list of activities was engaged in by petitioner's members on behalf of the petitioner. In addition, the Board found that several of the petitioner's members lectured to Party clubs on various subjects (R. 167) and at (R. 184) that "VALB member Abe Osheroff * * * urged a Party club to promote the Daily

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[36] *Cf.* the incident recited by the Board (R. 112) where the petitioner *unsuccessfully* solicited Party official Thompson to be active in petitioner's affairs. Thompson replied that he was too busy. The implication on the Board's resport that there was something special about this effort to activate Thompson is not supported by the record. This incident was only part of a general campaign to get more people to be active in petitioner (Tr: 2104).

Worker", although none of these incidents was in any way connected with petitioner.

The Board explains that such evidence nevertheless supports a finding against petitioner as follows:

> "* * * we hold that since the vast majority of [petitioner's] officers are Party members as is a substantial portion of its membership, the activities of these persons are in many respects directly chargeable to [petitioner] which can only act via its officers and members." (R. 109)

This is a *non sequitur*. The fact that petitioner can only act through its officers and members, does not make it responsible for their conduct when they are not acting for petitioner. This view moreover, contradicts the Board's disclaimer *supra*, p. 39, that it did not consider the Party activities of petitioner's members against petitioner (R. 199).

Similarly, the Board's findings concerning the endorsement of the circulation drive of the Daily Worker by "a group of veterans of the Abraham Lincoln Battalion" were in no way linked to the petitioner (R. 180-184). The exhibits relied on by the Board (P. Exs. 236 & 237) make it plain that the veterans were speaking in their individual capacity and not on behalf of the petitioner. Nor was the Board justified in relying on Budenz' "explanation" that Exhibit 237 represented action by petitioner in the face of the Exhibit's clear language to the contrary. In fact, the Board ignored Budenz' concession on cross-examination that the veterans whose names appeared in the exhibit were acting as members of the Party and not as representatives of petitioner (Tr. 2740). The invalidity of Budenz' "explanation" is further shown by the Board's effort to bolster it by the argument made by Budenz that petitioner did not protest use of its name by the Party in Exhibit 237. In the first place, petitioner is not bound by an article in the Daily Worker, and is under no compulsion to protest under

the penalty of being bound if it does not. Secondly, in the present case, since Exhibit 237 did not in fact use petitioner's name, there was no occasion for petitioner to protest in any event.

(c) Employment of Petitioner's Members as Couriers.

The Board recites two instances involving alleged employment of two of the government witnesses as couriers for the Soviet Union or the Party (R. 184-186). Neither incident was shown to be connected with the petitioner in any way. And the witness Hecht testified that petitioner had nothing to do with the Vladivostok incident set out in the report (Tr. 2539-40). Nevertheless, the Board utilizes these incidents as the basis for findings against petitioner.

(2) *The Board's Reliance on Hearsay.*

Many of the important findings of the Board were based on inadmissible hearsay evidence. The principal instances of such reliance are the testimony of both Budenz and Lautner which furnished the main source for the Board's findings on the formation of petitioner. Neither Budenz nor Lautner were veterans of the Spanish War nor members of petitioner (Tr. 2623, 363, 376). The Report itself recognizes that their testimony was not based on direct knowledge of events but on what they heard in Party circles.[37] In addition the Board relied on articles in the Daily Worker as furnishing evidence against petitioner. The chief instance of this is the Board's finding (R. 190-191) based solely upon the Daily Worker (P. Ex. 172) that petitioner paid homage to Stalin at the time of his death. The Board offers no legal theory for its reliance on hearsay. In a footnote it states that it does not agree with petitioner that such evidence is "technically incompetent" (R. 89). The Board states that "because of their official Party

[37] See R. 90. The fact that the Board labelled what Budenz heard in Party circles as "official Party reports" does not make it any the less hearsay.

character,"[34] Daily Worker articles are not subject to the same rules of evidence as are newspaper articles in other journals such as the New York Times or the Herald Tribune (R. 130). Assuming that the Daily Worker is the official publication of the Party, that would authorize its introduction as evidence of the Party views, but that is all. The hearsay rules of evidence apply to official Party publications and to conversations in Party circles.

The substantial evidence requirement of the Administrative Procedure Act prevents the basing of administrative orders on hearsay evidence. *Consolidated Edison Co.* v. *National Labor Relations Bd.*, 305 U. S. 197, 229; *National Labor Relations Bd.* v. *Amalgamated Meat Cutters*, 202 F. 2d 671, 673; *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691; *United States* v. *Watkins*, 73 F. Supp. 216, 221. Since, by its terms, the Internal Security Act places a greater evidentiary burden on the Board than on administrative agencies generally, *supra*, p. 14, the Board's reliance on hearsay was clearly error.[35].

C. Consequences of the Absence of Judicial Review, the Differences Between the Board's and Court's Principles, and the Staleness of the Record

In the court below, we pointed out that the Board's misinterpretation of the statutory criteria, distortion of the evidence, and reliance on evidence which was not connected with petitioner or was inadmissible as hearsay, required reversal of the Board's order. We pointed out that it was not appropriate for the court to consider on its own whether or not the evidence would sustain the Board's order on the basis of only appropriate standards and proper evidence, citing *N. L. R. B.* v. *Virginia Electric and Power Co.*, 314 U. S. 469; *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S.

[35] One would expect that the section of the Board Report headed Discussion of Law (R. 191-203), would show some recognition of this problem. However, the question is nowhere discussed therein.

17, 20; *Democrat Printing Co.* v. *F. C. C.*, 91 App. D. C. 72, 202 F. 2d 298; *Mississippi River Fuel Corp.* v. *F. P. C.* 82 App. D. C. 208, 224; 163 F. 2d 433; *McNeil* v. *Kennedy*, 111 App. D. C. 409, 298 F. 2d 323; *Carlisle* v. *Rogers*, 104 App. D. C. 307, 262 F. 2d 19.

The court failed to follow this settled policy for the judicial review of administrative agency decisions, a policy required even more here where the strict preponderance of evidence rule is applicable. It failed to review the Board's decision in detail in a number of respects where the errors were called to its attention. It is not at all clear whether it agreed or disagreed with the Board.

The court compounded the injury to petitioner by explicitly announcing three standards different from those of the Board: first, that the Act requires a finding that "the dominant or key officers in the management of the Brigade" were representatives of the Communist Party in order to satisfy the first half of the definition of a Communist front (*supra*, p. 15); second that it is petitioner's post-Act activities that are determinative (*supra*, pp. 223-224); and third, that the purpose of an organization can be determined by proof as to who controls it (*supra*, p. 32). The Board and court differed in a number of other respects, *e.g.*, the reliance placed by the court upon a single promotional letter of April, 1952 (*supra*, p. 15) and the Board's excessive reliance upon the pre-statutory activities (*supra*, p. 28).

Unless the proceeding is to be dismissed under the preponderant evidence rule, *supra*, pp. 13-21, or for constitutional reasons, *infra*, pp. 45-55, a remand to the court would seem appropriate so that petitioner could receive the judicial review to which it is entitled. Alternatively, a remand to the Board would be required under the *Chenery* rule because it never applied the principles enun-

ciated by the court below. Chief Judge Bazelon indicated an additional reason for a remand:

> "The record was stale when the Board made its findings. In the eight years since then there have been turbulent changes in world affairs" (R. 232) and "I would remand to the Board for further hearings concerning the activities of the Brigade from the passage of the Act in 1950 to the present." (R. 232)

Petitioner and its members should not be subjected to the serious sanctions of the Act in 1964 because of activities occurring two and three decades earlier. Such subjection would be particularly serious since no member of petitioner could challenge the findings herein in proceedings subsequently directed at him. But if the Board's decision is predicated upon an ancient record the proper remedy is to dismiss the proceeding entirely. If the Government can find *contemporary* facts to support a current order it has the power to institute a new proceeding.

III. The provisions of the Act relating to the registration of Communist-front organizations are unconstitutional on their face and as applied.

A. The First Amendment

In *Communist Party* v. *Subversive Activities Control Board, supra,* this Court upheld the constitutionality of the provision of the Act requiring the registration of Communist-action organizations as applied to the Communist Party. The Court recognized that the imposition of a registration requirement on an organization or an individual as a precondition to the exercise of the First Amendment rights of speech and assembly impairs those rights, 367 U. S. 1, 89; see also *Thomas* v. *Collins*, 323 U. S. 516; *Talley* v. *California*, 362 U. S. 60.

Applying the balancing doctrine (*cf. N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479), the Court held that the registration requirement was justified in that case because it was applied to an organization dominated by a foreign power, whose objectives were to overthrow our government by force, if necessary, and to establish a totalitarian dictatorship abroad in the foreign dominating country, 367 U. S. 1, 104-105. The validity of the order was upheld on the basis of findings by the Board, approved by the Court, that the Communist Party was substantially directed, dominated or controlled by the Soviet Union, and that its objectives were "(a) overthrow of existing government by any means necessary, including force and violence, (b) establishment of a Communist totalitarian dictatorship, (c) which will be subservient to the Soviet Union", 367 U. S. 1, 54-55.

Nothing in the opinion supports the constitutional application of the Act to an organization like the petitioner on the evidence in this record. On the contrary, the fair implication of the opinion is that the registration requirement may be constitutionally imposed only upon an organization such as the Communist Party was found to be in the *Communist Party* case. Thus the majority opinion stated at 104:

> "It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. See §§ 3(3),

> 2(4). It applies only to organizations directed, dominated, or controlled by a *particular* foreign country, the leaders of a movement which Congress has found, is 'in its origins, its development, and its present practice, * * * a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups * * *, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization' § 2(1). This is the full purported reach of the statute, and its fullest effect."

The court below has required registration upon the basis of activities all of which constitute the exercise of First Amendment rights and all of which are totally unrelated to the objective of a totalitarian dictatorship. It is a mark of how far governmental interference with First Amendment rights has won acceptance in this country that an appellate court should find justification for a registration order in petitioner's opposition to the Internal Security Act, which is the basis for the present proceeding; in the defense of petitioner's own members under the Smith Act; in public opposition to repressive regulation, and in a consistent position against Franco and fascism. The language and tone of the opinion below show frank disapproval of the petitioner's policies. Thus, in discussing petitioner's publications, the court says:

> "The principal interest reflected by these documents is, as the Brigade says, the defense of Steve Nelson, and to a less extent of Irving Weissman. Numerous appeals for funds for these purposes were made. The prosecutors, jurors and judges were vigorously assailed. Frame-ups were charged. Next in importance appears the Brigade's antagonism to Franco. The Truman administration was charged with all sorts of misdoing in its relations with Franco. Continuous attacks on the Internal Security

> **Act, Senator McCarran, the Un-American Activities Committee, the Wall Street imperialists, and all war-mongers appear in these issues. The publication demanded cessation of the Korean War. These were clearly the principal aims of the Brigade in the post-1950 years as reflected by its official communications to its members." (R. 227)**

The court describes these activities as "aims and purposes of the Communist Party"! (R. 227).

If an organization is to be subjected to this statute as a Communist-front organization because of the lower court's disapproval of the policies just recited, Professor Chafee was correct when he warned that the statute "creates a tremendous risk of outlawing a considerable number of groups of law-abiding people with inquiring minds, engaged in furthering the same end which they believe to be in the best interests of the United States", Chafee, *The Blessings of Liberty* (1956) 155.[39]

This Court's decisions have long ago brought us to agreement with Justice Holmes that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"; *Lochner* v. *New York*, 198 U. S. 45. Are we now to be told that the First Amendment contains an even more invidious built-in approval of General Franco, the House Committee on Un-American Activities and the official viewpoint on the Korean War?

A registration order thus founded upon frank disapproval of petitioner's political views discourages not only association with the petitioner, which is protected by the

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[39] See also Professor Chafee's warning in *Comment, The Registration of "Communist-Front" Organizations in the Mundt-Nixon Bill*, 63 Harv. L. Rev. 1382, 1387 (1950), that an organization may be outlawed "when the real reason for getting rid of it is not fear of the extremists but hatred of the legitimate purposes" and Professor Sutherland's reply, *Freedom and Internal Security*, 64 Harv. L. Rev. 383, 399 (1951), stating, *inter alia*, that the President's warning on the deviation point was based upon "a strained construction of the statute".

First Amendment (*N.A.A.C.P.* v. *Alabama,* 357 U. S. 449), but also freedom of expression, fulfillment of the duties of citizenship, exercise of the right of petition to Congress, and the ability to protect one's associates in criminal and civil litigation. See *N.A.A.C.P.* v. *Button,* 371 U. S. 415. When one adds to the organization's registration the sanctions of immediate disclosure and ultimate loss of important benefits (*infra,* pp. 6a, 8a), the discouragement can only be described as devastating.

B. The Vagueness of the Statute as Applied by the Court Below

The court's decision below removes from the statutory definition of a Communist front the only specific reference in the Act which can render it definite and meaningful, *i.e.,* the objectives of the world Communist movement. Absent this reference, the phrase "aid and support" in the definition is deprived of specific meaning and can include approval of foreign aid to Poland, famine relief to China, or, as here, support to Smith Act defendants or opposition to the Internal Security Act, and, in some circles, integration of schools,[40] medical care for the aged and similar measures which have been supported by Communists from time to time. So vague and undefined a standard, particularly in the area of the First Amendment, offends due process. *Burstyn* v. *Wilson,* 343 U. S. 495; *Winters* v. *New York,* 333 U. S. 507; *Herndon* v. *Lowry,* 301 U. S. 242; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Baggett* v. *Bullitt,* 377 U. S. 360.

In the last two cases this Court held state loyalty oaths invalid for vagueness because they failed to define such terms as "aid to the Communist Party". In *Cramp* this Court stated (at 286):

> "Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid', or 'support', or 'advice',

[40] See *Dombrowski* v. *Pfister, prob. juris.* noted, Oct. Term 1964, No. 54.

> or 'counsel' or 'influence' to the Communist Party. What do these phrases mean? * * * Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'? Indeed, could anyone honestly subscribe to the oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?
>
> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language."

Moreover, a construction of the words "aid and support" as not being limited in any way by the Congressional findings as to the unlawful objectives of the world Communist movement presents this Court with a well-nigh hopeless task. For then it becomes the function of the Court to determine, without any guide from Congress, what activities "aid and support" the world Communist movement. And here the Court would truly be stepping into a "political thicket". For there are few political issues being debated today where the proponents of either side do not argue that the position of their opponents gives aid and support to the world Communist movement. To the opponents of the integration of schools or other measures to eliminate discrimination against the Negro people, these measures are directly aimed at supporting the "Communist conspiracy". The proponents of these measures argue, on the other hand, that these anti-discrimination measures are essential to combat the influence of Communism both home and abroad because Communists utilize our practice of discrimination against the Negro people to advance Communist purposes. To the Board, opposition to the Internal Security Act gives aid and support to the world Communist movement. Yet President Truman vetoed the Act because he considered it

a danger to our institutions. H. Doc. 708, 81st Cong. 2d Sess., see also H. Doc. 679, 81st Cong. 2d Sess. pp. 5-6.[41]

How is a conscientious court to choose among these alternatives? It can only define the terms, "aid and support", in accordance with its own political predilections which may or may not accord with the Board's, thus leaving the phrase with no standard or context except the political views of the tribunal deciding each case.

There is no reason to believe that Congress meant to leave the net so wide and undefined or that it desired the courts to construe the statute so as to render it unconstitutional. And under the Act, as construed to meet constitutional requirements, the order cannot stand.

The vagueness in the instant case is compounded by the subjective test which the lower court posed when, in discussing "objectives which are objectives of the Communist Party" (R. 228), it inquired as to the motivation for adopting those objectives. Since such motivation is not—at least in this case—the subject of direct evidence but is inferred by the Court, there is a total absence of precision in an area protected by the First Amendment.

C. The Order Below, Predicated Upon Events Antedating the Statute, Denies Due Process and Violates the *Ex Post Facto* Provision of the Constitution

There is no evidence that since the date of the Act, petitioner's managers have been Communist representa-

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[41] To many, including Justices of this Court, opposition to the Smith Act or the Internal Security Act does not aid and support the world Communist movement, but on the contrary strengthens the United States in its competition with Communism. The Board's approach in the present case leads directly to the type of attack made recently by Senator Eastland when he prepared a score card on "pro-Communist" votes of Justices of this Court. 108 Cong. Rec. 7027-31, May 2, 1962. But see the reply of Senator Javits that the criterion for this chart was Senator Eastland's but not necessarily that of other Senators or of the Senate as a whole. *Id.* at 7031.

tives or that petitioner's activities have not been those of peaceful positions on political matters including legislation, support of its members improperly charged with political crime, and self-help in this proceeding.

The order below is predicated upon the Board's open reliance upon the pre-statutory activities of petitioner and upon the court's acquiescence in that reliance upon a more sophisticated theory of "context" or "coloration" (R. 228). In either case, petitioner has been adjudged a Communist front not because of what it was from 1950 to 1955, but because what it and others did in the years 1936-1949. See *United States* v. *Oregon Medical Society*, 343 U. S. 326, 334. Aside from this disregard of statutory intent, *supra*, p. 44, such an order denies due process and violates the *ex post facto* provision of the Constitution. See *White* v. *United States*, 191 U. S. 545, 552; *Shreveport* v. *Cole*, 129 U. S. 36; *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, *Ex parte Garland*, 4 Wall (71 U. S.) 333; *Pierce* v. *Carskadan* 16 Wall (83 U. S.) 284; *Burgess* v. *Salmon*, 97 U. S. 381. It requires registration and imposes sanctions and disabilities upon petitioner and its members not on the basis of what petitioner is, but on the basis of what it is imputed to have been. This is to "punish that individual for past activities" since it cannot be said to be "a regulation of a present situation", *De Veau* v. *Braisted*, 363 U. S. 144, 160 (plurality opinion); *Flemming* v. *Nestor*, 363 U. S. 603, 613. It shows a purpose "to reach the person, not the calling", *Cummings* v. *Missouri*, *supra*, p. 320. This is not "the mere denial of a non-contractual benefit", *Flemming* v. *Nestor*, 363 U. S. at 617; rather "affirmative disability [and] restraint is imposed", *ibid.* Thus, the statute goes far beyond what this Court approved by a divided vote in *American Communications Association* v. *Douds*, 339 U. S. 382 and in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1.

D. The Board's Order Denies Due Process Because it Relied in This Proceeding Upon its Findings in the *Communist Party* case

Petitioner cannot be found to be a Communist front in the absence of a finding that the Communist Party was a Communist-action organization. The Board held, however (R. 201-202), that its prior determination in the *Communist Party* case that the Party was a Communist-action organization was "binding and conclusive" on petitioner. However, since petitioner was not a party to the *Communist Party* case, this finding is a denial of due process. *Hansberry* v. *Lee,* 311 U. S. 32; *Kirby* v. *United States,* 174 U. S. 47. Since the bar is a constitutional one, it is not removed by the Board's claim that its contrary holding is "a reasonable construction of the Act" (R. 202).

The argument of the Board that the finding in the *Party* case is binding on petitioner because of the "intimate relationship" between the two is on its face unsound. The finding in the *Party* case could be made binding on petitioner only if petitioner were a constituent part of the Party. The Board made no such finding and obviously could not do so, because its whole theory is that the Party and petitioner are separate and distinct organizations.

The Board's compliance with the requirements of due process would not have obstructed the proper enforcement of the Act. The Board could have made petitioner, as an alleged front, a party to the original proceeding against the Communist Party which would have avoided any duplication of evidence and permitted a joint decision on both Communist-action and Communist-front organizations. Alternatively, having made the error of proceeding separately against the Communist Party, the Board could have instituted the within proceeding against petitioner but offered evidence to show that the Communist Party was an action organization.

Finally, the determination that the Communist Party was a Communist-action organization was made for a prior

period. There is no determination that it was a Communist-action organization as of the time of the order against petitioner.

E. The Act is Invalid as Applied Because it Conflicts With the Privilege Against Self-Incrimination

In *Communist Party* v. *S.A.C.B., supra,* at 105-10 a bare majority of the Court refused to determine as premature the Communist Party's contention that the Communist action provisions of the Act are invalid because they would impair the privilege against self-incrimination of the Communist Party's officers. In the light of the reasons stated in the dissenting opinions of Justices Douglas and Brennan and the subsequent history of the *Communist Party* case, we request the Court to reconsider this aspect of the decision.

The failure of the Communist Party to register has thus far been sustained on the ground of the constitutional privilege against self-incrimination of its officers. See *Communist Party* v. *United States,* 331 F. 2d 897, *cert. den.,* 377 U. S. 968, *sub nom United States* v. *Communist Party.* It is unreasonable to require the registration of and to impose disabilities upon a "Communist-front" organization when the so-called parent organization, the communist-action organization, is relieved of the need to register.

F. The Act is Invalid Because of the Sanctions That it Imposes Upon Petitioner and its Members

The substantiality of the sanctions imposed upon petitioner and its members are obvious, *infra,* pp. 6a-11a, 14a. In the *Communist Party* case, this Court declined to consider those sanctions as premature. All of those sanctions are still operative with the single exception of the passport provision held unconstitutional by this Court in *Aptheker* v. *The Secretary of State,* 378 U. S. 500. It is respectfully submitted that this Court erred in not consid-

ering these sanctions in the *Communist Party* case and that, in any event, it would be error to continue that policy where the registration proceeding is directed against an organization whose purposes are not claimed to be the sinister ones attributed to Communist-action organizations. Therefore, for the reasons urged by the Communist Party in the original *Communist Party* case, we urge that in determining the validity of the Act this Court consider the impact upon the petitioner and upon its individual members of the various sanctions imposed by this statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed with directions to set aside the order of the Board.

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October 6, 1964.

APPENDIX

Statute Involved

Pertinent provisions of the Subversive Activities Control Act of 1950 (which is Title I of the Internal Security Act of 1950), as amended, 64 Stat. 987, 50 U.S.C. 781, et seq., are as follows. (The Act's section numbers are followed by the appropriate section numbers of 50 U.S.C. in brackets.)

Sec. 1(b) [798]. Preservation of certain rights.

Nothing in this chapter * * * shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated under said subchapter and sections having that effect. Sept. 23, 1950, Title I, § 1(b), 64 Stat. 787.

Sec. 2 [781]. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative

form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of the world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and pro-

mote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts," which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts."

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of Communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of Communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow

of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

Sec. 3 [782]. For the purposes of this title—

* * * * *

(2) The term "organization" means an organization, corporation, company, partnership, association, trust, foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of

this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

* * * * *

Sec. 5 [784]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any non-elective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any non-elective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. 152), or to represent any employer in any matter or proceeding arising or pending under the Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization;

* * * * *

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby . . .

Sec. 6 [785]. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or

notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

* * * * *

Sec. [786].

* * * * *

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

* * * * *

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and the last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

* * * * *

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organizations, its officers or members have an interest.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations

prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraphs (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

* * * * *

Sec. 9 [788]. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

* * * * *

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection . . .

* * * * *

Sec. 10 [789]. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization, or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of

interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by ....., a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ....., a Communist organization."

Sec. 11 [790]. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.

* * * * *

Sec. 13 [792]. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * * * *

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; . . .

* * * * * *

Sec. 15 [793]. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such addi-

tional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. . . .

* * * * *

Sec. 15 [784]. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully

makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement willfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

Sec. 16 [795]. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.